# Low Seng v IKIP Education Sdn Bhd

HIGH COURT (KUANTAN) — CIVIL APPEAL NO C-04–62 OF 2007
MOHAMED APANDI J
31 OCTOBER 2008

*Contract — Lease — Breach — Claim for damages by landlord — Whether landlord entitled to three years rental*

*Contract — Parol evidence — Additions to agreement — 'Consensus ad idem' and intention of parties to lease premises evidenced in letter — Whether oral evidence inadmissible to add further terms*

*Evidence — Parol evidence rule — Additions to agreement — 'Consensus ad idem' and intention of parties to lease premises evidenced in letter — Whether oral evidence inadmissible to add further terms*

*Landlord and Tenant — Determination — Breach by tenant — Claim for damages by landlord — Whether landlord entitled to three years rental*

The respondent alleged that there was an agreement entered with the appellant whereby the appellant had agreed to lease a premises from the respondent at a rent of RM2,500 per month commencing 1 April 1997. This agreement was in the form of a letter signed by an employee of the appellant ('exh P1'). The respondent alleged that the appellant had orally agreed to lease the premises for a minimum period of three years. This however was not stated anywhere in P1. The appellant on the other hand contended that P1 was only a letter to offer and that there was no binding contract. The appellant purported to determine the lease and the respondent claimed, inter alia, RM7,500 being three months rent arrears and RM55,000 being the loss of monthly rent for the purported three year period. The learned sessions court judge found in favour of the respondent and hence this appeal.

**Held**, allowing the appeal with costs:

(1) From the construction of P1, it was very clear that the appellant intended to lease the premise. Due to the fact that P1 was the only

document evidencing 'consensus ad idem' and the intention of the parties, it had to be read as it was and nothing verbal could be allowed to change, add or amend it (see para 48).

(2) The evidence to prove the respondent's contention that during the negotiation the parties had agreed for a three years lease period and that the appellant would give a deposit of RM5,000 to the respondent was absolutely insufficient (see para 49).

(3) On the balance of probability, the respondent was only entitled to claim for the arrears of three months rent and not for any other damages. The plaintiff's claim for general damages was too remote and not substantiated with any evidence (see paras 51–52).

**[Bahasa Malaysia summary**

Responden mendakwa bahawa terdapat satu perjanjian yang ditandatangani dengan perayu di mana perayu telah bersetuju untuk menyewa sebuah premis daripada responden pada sewa sebanyak RM2,500 setiap bulan bermula dari 1 April 1997. Perjanjian ini adalah dalam bentuk sepucuk surat yang ditandatangani oleh seorang pekerja perayu ('eksh P1'). Responden menyatakan bahawa perayu telah bersetuju secara lisan untuk menyewa premis itu untuk satu tempoh minimum selama tiga tahun. Walau bagaimanapun perkara ini tidak dinyatakan dalam P1. Perayu sebaliknya mengatakan bahawa P1 hanyalah sepucuk surat tawaran dan bukan kontrak yang mengikat pihak-pihak. Perayu bermaksud untuk menamatkan sewaan dan responden menuntut, antara lain, RM7,500 yang merupakan tunggakan sewa selama tiga bulan dan RM55,000 yang merupakan kehilangan sewa bulanan untuk tempoh tiga tahun seperti yang didakwa. Hakim mahkamah sesyen yang bijaksana membuat keputusan berpihak kepada responden dan maka rayuan ini.

**Diputuskan**, membenarkan rayuan dengan kos:

(1) Daripada pentafsiran P1, amat jelas bahawa perayu berniat untuk menyewa premis itu. Disebabkan fakta bahawa P1 adalah satu-satunya dokumen yang membuktikan 'consensus ad idem' dan niat pihak-pihak, P1 perlu dibaca sebagaimana ditulis dan tidak ada apa-apa penyataan lisan yang dibenarkan untuk mengubah, menambah atau memindanya (lihat perenggan 48).

(2) Keterangan untuk membuktikan hujahan responden bahawa semasa rundingan pihak-pihak telah bersetuju untuk sewaan selama tiga tahun dan perayu akan memberi deposit sebanyak RM5,000 kepada responden adalah amat tidak mencukupi (lihat perenggan 49).

(3) Atas imbangan kebarangkalian, responden hanya berhak untuk menuntut tunggakan sewaan bagi tiga bulan dan tidak berhak untuk sebarang ganti rugi lain. Tuntutan plaintif untuk ganti rugi am adalah tidak berkaitan dan tidak disokong dengan sebarang bukti (lihat perenggan 51–52).]

**Notes**

For a case on breach by tenant, see 9 *Mallal's Digest* (4th Ed, 2005 Reissue) para 856.

For cases on additions to agreement, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1887–1888.

For cases on breach, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 4304–4312.

For cases on parol evidence generally, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 4554–4555.

**Cases referred to**

*Dato' Mohd Anuar bin Embong & Anor v Bank Bumiputra (M) Bhd* [1997] 1 MLJ 642, CA (refd)

*Datuk Tan Leng Teck v Sarjana Sdn Bhd & Ors* [1997] 4 MLJ 329, HC (refd)

*Hadley v Baxendale* (1854) 9 Exch 341 (refd)

*Louisa Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256; 62 LJQB 257; 67 LT 837; 41 WR 210; 57 JP 325; 4 R 175 (refd)

*Ng Brothers Construction v Kaolin (Malaysia) Sdn Bhd* [1985] 1 MLJ 245, HC (refd)

*Sinar Wang Sdn Bhd v Ng Kee Seng* [2005] 2 MLJ 42; [2004] 3 CLJ 679, CA (refd)

*Toeh Kee Keong v Tambun Mining Co Ltd* [1968] 1 MLJ 39, FC (refd)

**Legislation referred to**

Companies Act 1965
Contracts Act 1950 ss 5, 5(2), 6, 40, 74
Evidence Act 1950 ss 9, 91, 92, 92(b)

*Ibrahim Kamaruddin (Ibrahim Kamaruddin & Associates) for the appellant. Wong Chang (Wong Chang & Associates) for the respondent.*

**Mohamed Apandi J:**

**[1]** This is an appeal from the sessions court against the decision made by the learned sessions court judge in favour of the plaintiff (the respondent) for damages arising from an alleged breach of terms of lease of the premise belonging to the plaintiff, known as No 5, Lorong Kubang Buaya 30, 25250

Kuantan, Pahang ('the premise').

BRIEF FACTS OF CASE

**[2]** The plaintiff (respondent) is the registered owner of the premise, whereas the defendant (appellant) is a private listed company registered under the Companies Act 1965.

**[3]** The plaintiff (respondent) claimed that there exist a lease agreement between the plaintiff and the defendant in a form of letter signed by the defendant's employee, one Azman bin Ahmad (see p 182 of the appeal record) ('P1'). In P1, the defendant had agreed to lease the premise with monthly rent of RM2,500 per month commencing on 1 April 1997. The defendant however on 28 March 1997 forwarded another letter to the plaintiff cancelling P1 (see pp 193–194 of the appeal record) ('D5').

**[4]** The plaintiff then forwarded a notice to quit dated 2 June 1997 demanding from the defendant the amount of RM5,000 for security deposit and RM7,500 for rental arrears totaling in RM12,000 (see p 183 of the appeal records) ('P2') and afterwards commenced this suit against the defendant.

**[5]** Learned sessions court judge, after hearing both parties decided that P1 amounted to a valid and binding lease agreement between the parties and held that the defendant had breach the agreement and as such liable to pay the plaintiff the following:

(a) the sum of RM7,500 for special damages for three months rent arrears from 1 April 1997 until 30 June 1997;

(b) the sum of RM55,000 for general damages for lost of monthly rent from 1 July 1997 until 31 March 2000;

(c) interests at the rate of 4%pa over the sum of RM7,500 from the date of the summons until the date of judgment and at the 8%pa until full payment;

(d) interests at the rate of 8%pa over the sum of RM55,000 from the date of the summons until full payment; and

(e) costs in the sum of RM5,277.70.

**[6]** The defendant not satisfied with the above decision appeals against the whole of the said decision.

SUBMISSIONS

*The appellant's case*

**[7]** The appellant filed this appeal on the grounds that:

(a) Learned sessions court judge had erred in fact and in law in holding that P1 is a valid lease agreement binding over the appellant;

(b) Learned sessions court judge had erred in fact and in law in rewarding the respondent arrears three months rent of RM7,500; and

(c) Learned sessions judge had erred in law and in fact in rewarding the respondent general damages of RM55,000 for lost of rent from 1 July 1997 until 31 March 2000.

P1

Letter to offer

**[8]** It was submitted by the appellant that P1 is only a *letter to offer* from the appellant to the respondent in response to the respondent's advertisement offering to rent the premise with monthly rent of RM2,500 from 1 April 1997.

**[9]** The appellant further submitted that the respondent's advertisement which was posted at the premise's front gate is an invitation to treat and the law as regard to an invitation to treat is very clear as laid down in the case of *Louisa Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256; 62 LJQB 257; 67 LT 837; 41 WR 210; 57 JP 325; 4 R 175 (see pp 2–3 of the appellant's BOA). Referring to this case the appellant submits that before the offer can be considered as a contract binding over the parties, there must first be an acceptance from the person making the advertisement, and as no acceptance was ever made by the respondent, by virtue of s 6 of the Contracts Act 1950, the letter to offer produced by the appellant is null and void.

Terms and conditions

**[10]** The appellant further submitted that P1 lacks all the terms and conditions and also the pre-terms such as the payment of deposit, etc of the usual lease agreement to be considered as one. The appellant submitted that if the respondent truly considered P1 as the original lease document, by virtue of ss 91 and 92 of the Evidence Act 1950, the respondent is prevented from producing any verbal evidence to add, amend or change the agreement. The appellant quoted the case of *Datuk Tan Leng Teck v Sarjana Sdn Bhd & Ors* [1997] 4 MLJ 329 to further support its submission (see p 16 of the appellant's BOA).

Absence of company resolution

**[11]** The appellant also submitted that the respondent had never received

A any of the appellant's company resolution to lease the premise as required from any private listed company before entering into any agreement (see p 29 of the appeal record).

Keys to the premise

B

**[12]** The appellant further submitted that Encik Azman bin Ahmad Shah, the representative of the appellant has never asked to be given the keys to the premise and this automatically verified the facts that the appellant has never requested for a vacant possession of the premise. The respondent nevertheless, C on his own accord handed over the keys to the premise to the appellant.

**[13]** The appellant then submitted that as testified by Encik Azman which was never denied by the respondent, the appellant never occupied or make D any renovation to the premise.

**[14]** From all the above, the appellant as such concluded that P1 is not a lease agreement.

E

**[15]** Alternatively, if the court perceives P1 as the letter confirming the lease, the appellant submitted that the same has been terminated by the appellant via phone on 25 March 1997 (see p 34 of the appeal record) and then via letter of termination, D5.

F

**[16]** With regards to the keys to the premise, the appellant submitted that it was returned to the respondent on 31 March 1997, ie before the commencement of the alleged tenancy.

G

**[17]** The appellant as such concluded that in lieu of ss 5 and 6 of the Contracts Act 1950, the cancellation of the lease was done before 1 April 1997 which was before the lease was supposed to commence.

Arrears of rent

H

**[18]** The appellant submitted that the appellant should not be ordered to pay the arrears of rent of RM7,500 to the respondent because there was no lease agreement between them.

I

**[19]** In the alternative, if the court perceives that there is an agreement between the parties, the appellant submitted that the respondent is still entitled to any arrears of rent as the respondent via a notice to quit dated 2 June 1997 (P2) have terminated the agreement seven days from the date the

notice was issued ie on 9 June 1997, which is less than three months of renting to entitled the respondent to claim for any arrears.

**[20]** Furthermore, the respondent himself has admitted that P2 is a termination letter. In any case, the appellant submitted that even if the respondent is entitled to any arrears, the sum entitled as far less than the sum claimed.

General damages

**[21]** The appellant submitted that the appellant should not have to pay general damages in the sum of RM55,000 for loss of monthly rent from 1 July 1997 to 31 March 2000 because:

(a) there is no lease agreement between the parties;

(b) even if there is an agreement, the same has been terminated via P2; and

(c) the damages was to remote so that it does not fall into any limb under s 74 of the Contracts Act 1950 as held in the case of *Hadley v Baxendale* (1854) 9 Exch 341 and referred to in the case of *Toeh Kee Keong v Tambun Mining Co Ltd* [1968] 1 MLJ 39 as the damages claimed by the respondent did not arise naturally or even in the contemplation of both parties (see p 39 of the appellant's BOA).

*Respondent's case*

P1

**[22]** The respondent on the other hand submitted that P1 as the original lease document, clearly shows the intention of the appellant when the word 'bersetuju (agree)' was used. The respondent submits that if P1 is only a letter of offer as submitted by the appellant, the appellant would have used the word 'menawar (offer)' or 'bercadang (propose)' and not 'bersetuju (agree)'.

**[23]** The respondent further submits that even if P1 is only a letter of offer as alleged by the appellant, handing over of vacant possession of the premise by giving the keys to the appellant can be implied to be an acceptance to the offer.

**[24]** The respondent during examination has testified that in mid March, 1997 upon request by the appellant have given the keys to the premise to enable the appellant to do some renovation to the house (see pp 25 and 30 of the appeal record) and the appellant has admitted to this (see p 34 of the appeal record).

A **[25]** By virtue of s 9 of the Evidence Act 1950 'so far as the proposal or acceptance of any promise is made by words, the promise is said to be express. So far as the proposal or acceptance is made otherwise than in words, the promise is said to be implied' (see p 3 of the respondent's BOA), the respondent submitted that without any doubt, there is an agreement binding
B over the parties.

**[26]** With regards to the lacks of formal agreement sign by both parties, the respondent quoted the case of *Ng Brothers Construction v Kaolin (Malaysia) Sdn Bhd* [1985] 1 MLJ 245 (see pp 10–13 of the respondent's BOA) whereby
C the court held that 'by delivering a letter accepting the plaintiff's quotation by the defendant, a contract binding both parties was formed even though there is a statement stating that 'we would also be sending you at a later date an official contract for you to sign to complete the usual formality'.

D **[27]** The respondent as such submitted that by delivering P1 to the respondent it becomes an agreement binding both parties even when there is no formal agreement.

E **[28]** In reply to the appellant's submission that if P1 is the original lease agreement no verbal evidence can be given to add or amend it, the respondent submits that P1 is not the original lease agreement, but it is still a contract binding upon the parties as held in the case of *Ng Brothers*, and as such verbal evidence can still be given to prove the existence of other terms
F such as the period of lease.

**[29]** The respondent further submits that even though s 92 of the Evidence Act 1950 does not allow verbal evidence to be produced to amend or change the terms to a formal agreement, the provisos to the section provides several
G exception, such as in proviso (b) 'the existence of any separate oral agreement, as to any matter on which a document is silent and which is not inconsistent with its terms, may be proved and in considering whether or not this proviso applies, the court shall have the regard to the degree of formality of the document'. As such the respondent submitted that since P1 is not a formal
H document, any verbal evidence can be given to add or amend its content, and in this case the term that the lease will be for a period of three years and the appellant would give a deposit of RM5,000 to the respondent.

**[30]** With regards to the keys to the premise, the respondent submits that
I the court should disregard D5 and the appellant's contention that they have returned the keys back to the respondent as these were not pleaded.

**[31]** The respondent however submits that in any way, D5 have no effect to terminate the agreement without the other party's consent except in the

circumstances dictated under s 40 of the Contracts Act 1950; 'a party is not entitled to terminate an agreement unilaterally unless there is a breach of terms by the other party'.

**[32]** The respondent further submits that D5 was delivered on 28 March 1997 and the keys on 29 March 1997, as alleged by the appellant, and with reference to s 5(2) of the Contracts Act 1950; 'an acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor but not afterwards'. The respondent as such submits that D5 is contrary to the above section and therefore is without effect.

Arrears of rent

**[33]** With regard to the arrears of rent, the respondent submits that even though the appellant has returned vacant possession (keys) of the premise to the respondent, the appellant has breached the agreement when it failed to pay the rental due and the deposit to the respondent, even after P2 was served on the appellant.

**[34]** The respondent submits that the arrears due is for the period of three months ie from the date of commencement of the lease, which was on 1 April 1997 until June, 1997, at RM2,500 per month. In total, the amount of arrears due is:

RM2,500 x 3 = RM7,500

General damages

**[35]** With regards to general damages, the respondent submits that due to the appellant's breach, the respondent suffered lost and damages.

**[36]** The respondent submits that after the contract was terminated in June, 1997 the respondent have make several efforts to lease the premise (see exhs P3(a)–(c) at pp 185–190 of the appeal record), and was only successful on 1 January 1998, with monthly rent of RM1,000 for a period of ten months.

**[37]** The respondent further submits that he have taken several steps to mitigate his lost such as by appointing a broker and advertisement in newspaper.

**[38]** To substantiate his submission, the respondent referred to s 74 of the Contracts Act 1950;

1 When a contract has been broken, the party who suffers by the breach

A is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew when they made the contract to be likely to result from the breach of it.

B

2 Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach (at pp 6–9 of the respondent's BOA).

C

**[39]** And to the case of *Dato' Mohd Anuar bin Embong & Anor v Bank Bumiputra (M) Bhd* [1997] 1 MLJ 642 where the Court of Appeal held that:

D Section 74(1) and (2) of the Contracts Act is based on the rule in *Hadley v Baxendale*. Section 74(1) covers the situation where the damages suffered arise naturally from the breach. Section 74(2) covers the situation where the parties at the time of the contract were aware that the damage or loss is likely as the result of the breach of the contract (at pp 14–33 of the respondent's BOA).

E **[40]** The respondent as such submits that they have proven that they are entitled to:

(a) Arrears of rent of RM7,500.

(b) Damages for loss of rent:

F

i from 1 July 1997 — 31 December 1998 (6 months) = RM15,000;

ii from 1 January 1998 — 31 March 2000 (27 months) ie the balance of the rental period of three years where the premise was rented at RM1,500 per month

G = RM1,500 x 27 = RM40,500.

In total RM15,000 + RM40,500 = RM55,500

JUDGMENT

H

**[41]** This is a suit commenced by the plaintiff (respondent) who alleged that there was an agreement entered with the appellant whereby the appellant had agreed to lease the premise with a monthly rent of RM2500 per month commencing from 1 April 1997. This agreement was in the form of a letter I signed by an employee of the appellant, one Azman bin Ahmad Shah that was tendered during trial as exh P1. The respondent also alleged that via a negotiation between him and Azman, the appellant has agreed to lease the premise for a minimum period of three years with option for renewal. This term however was not stated anywhere in P1.

**[42]** The appellant on the other hand contended that P1 was only a letter to offer subject to the respondent acceptance, and without properly accepting it, was not a contract binding over them, and in any case, if P1 was taken to be an agreement, it has been terminated via a letter of termination from the appellant tendered as D5 and a notice to quit from the respondent tendered as P2.

**[43]** There are four issues to be determined, and these issues were interconnected to one another:

(a) Whether there exists a binding agreement between the parties.

(b) If yes, whether the appellant is liable to pay the arrears of rent to the respondent?

(c) Whether the appellant is in breach of the agreement?

(d) And finally, whether the appellant is liable to pay for damages suffered by the respondent?

**[44]** From the above, it can be clearly seen that the only documentary evidence with regards to the existence of the lease is P1. There is no other written agreement between the appellant and respondent with regards to the lease.

**[45]** The contents of P1 read as follows:

1. Merujuk kepada perkara di atas, adalah dimaklumkan bahawa pihak IKIP bersetuju untuk menyewa premis tuan yang beralamat di No. 5, Lorong Kubang Buaya 30, 252250 Kuantan, Pahang.

2. Bayaran sewaan adalah sebanyak RM2,500.00 sebulan bermula dari 1/4/1997.

**[46]** From the testimony of the respondent himself, he verified that P1 was the confirmation of the terms that are the 'consensus ad idem' reached into during the negotiation between him and Encik Azman, whereby the appellant had agreed to lease the premise with monthly rent of RM2,500 beginning 1 April 1997.

**[47]** In the case of *Sinar Wang Sdn Bhd v Ng Kee Seng* [2005] 2 MLJ 42; [2004] 3 CLJ 679:

> The defendant argued that there was no concluded contract. Indeed its entire pleaded case was aimed in that direction. The plaintiff said there was a concluded contract. The learned judge, as we have already said agreed with the plaintiff. We think that the learned judge was correct.

Now, there are three broad categories into which the negotiations between parties to an agreement may fall. These were neatly summarised by Dixon CJ, McTiernan and Kitto JJ in *Masters v Cameron* (1954) 91 CLR 353:

> Where parties who have been in negotiation reach agreement upon terms of a contractual nature and also agree that the matter of their negotiation shall be dealt with by a formal contract, the case may belong to any three classes. It may be one in which the parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated in a form which will be fuller and more precise but not different in effect. Or secondly, it may be a case in which the parties have completely agreed upon all the terms of their bargain and intend no departure from or addition to that which their agreed terms express or imply, but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document. Or, thirdly, the case may be one in which the intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract. In each of the first case a contract binding the parties at once to perform the agreed terms whether the contemplated formal document comes into existence or not, and to join (if they have so agreed) in settling and executing the formal document; and in the second case a contract binding the parties to join in bringing the formal contract into existence and then carry it into execution.

The task that the court should undertake when it is confronted with the question whether there was a binding contract arrived at through correspondence was set out in the following terms by the Federal Court in *Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327; [1997] 1 CLJ 625:

> An agreement to make an agreement does not result in a contract. It is for the court in each case to construe the correspondence exchanged between the parties and to say whether that is the result intended by the parties. If the court reaches an opposite conclusion, then there is an enforceable contract.

**[48]** In the present case, P1 is the only document available with regards to the lease, and from the construction of P1, it is very clear that the appellant intended to lease the premise. Due to the fact that P1 is the only document evidencing 'consensus ad idem' and the intention of the parties, it must be read as it is and nothing verbal can be allowed to change, add or amend it.

**[49]** Furthermore, the evidence to prove the respondent's contention that during the negotiation the parties has agreed that the period of the lease would be for three years with option for renewal and that the appellant would give a deposit of RM5,000 to the respondent is absolutely insufficient.

**[50]** It can be further seen from the evidence produced that the lease was subsequently terminated by the respondent via P2 which was dated 2 June 1997, and in P2 the respondent's demand was only for the 'vacant possession'

(key) of the premise and for arrears of three months rent. The appellant however contended that the keys to the premise were already returned to the respondent in about June 1997. The evidence on this matter however was not clear.

**[51]** The court therefore held that, on the balance of probability, the respondent is only entitled to claim for the arrears of three months rent ie the sum of RM7,500, and not for any other damages.

**[52]** The court therefore allowed the defendant's appeal that the sessions court's judgment dated 15 September 2006 was set aside and replaced by a new one, ie the plaintiff's claim can only succeed in respect of prayers 9(a), (d) and (f) of the statement of claim. The plaintiff's claim for general damages are too remote and not substantiated with any evidence. The appeal is allowed with costs.

*Appeal allowed with costs.*

Reported by Kanesh Sundrum